

**Security Council**

Distr.: General
25 April 2014

Original: English

Letter dated 24 April 2014 from the Secretary-General addressed to the President of the Security Council

In accordance with article 17, paragraph 3, of the Relationship Agreement between the United Nations and the International Criminal Court, I have the honour to convey the attached communication dated 11 April 2014 from the President of the Court (see annex). The President transmits the decision on the cooperation of the Democratic Republic of the Congo regarding Omar Al Bashir's arrest and surrender to the Court, issued by Pre-Trial Chamber II of the Court on 9 April 2014 in the case of the *Prosecutor v. Omar Hassan Ahmad Al Bashir*.

I should be most grateful if you would bring the present letter and its annex to the attention of the members of the Security Council.

(Signed) **BAN Ki-moon**



Annex

Letter dated 11 April 2014 from the President of the International Criminal Court addressed to the Secretary-General

Pursuant to article 17 (3) of the Relationship Agreement between the United Nations and the International Criminal Court and in accordance with article 87 (7) of the Rome Statute and regulation 109 (4) of the Regulations of the Court, and as requested by Pre-Trial Chamber II, I hereby transmit the decision on the cooperation of the Democratic Republic of the Congo regarding Omar Al Bashir's arrest and surrender to the Court of the Chamber, dated 9 April 2014, and refer this matter to the Security Council.

I would be grateful if you would convey the present letter and its enclosure to the Security Council.

(Signed) Sang-Hyun Song

Enclosure

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

No.: ICC-02/05-01/09

Date: 9 April 2014

PRE-TRIAL CHAMBER II

Before: Judge Ekaterina Trendafilova, Presiding Judge
Judge Hans-Peter Kaul
Judge Cuno Tarfusser

SITUATION IN DARFUR, SUDAN

THE PROSECUTOR V. OMAR HASSAN AHMAD AL BASHIR

Public

**Decision on the Cooperation of the Democratic Republic of the Congo Regarding
Omar Al Bashir's Arrest and Surrender to the Court**

No. ICC-02/05-01/09

9 April 2014

Document to be notified, in accordance with regulation 31 of the *Regulations of the Court*, to:

The Office of the Prosecutor

Counsel for the Defence

Fatou Bensouda, Prosecutor

James Stewart, Deputy Prosecutor

Legal Representatives of Victims

Legal Representatives of Applicants

Unrepresented Victims

**Unrepresented Applicants for
Participation/Reparation**

**The Office of Public Counsel for
Victims**

**The Office of Public Counsel for the
Defence**

States Representatives
Competent authorities of
the Democratic Republic of the Congo

Amicus Curiae

REGISTRY

Registrar

Deputy Registrar

Herman von Hebel

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Others

Pre-Trial Chamber II (the "Chamber") of the International Criminal Court (the "Court" or the "ICC") issues this decision on the cooperation of the Democratic Republic of the Congo regarding the arrest and surrender of Omar Hassan Ahmad Al Bashir ("Omar Al Bashir") to the Court.

I. PROCEDURAL HISTORY

1. On 31 March 2005, the Security Council (the "SC" or the "Council") acting under Chapter VII of the Charter of the United Nations (the "UN") adopted Resolution 1593(2005) referring the situation in Darfur, Sudan to the Court.¹
2. On 4 March 2009 and 12 July 2010, Pre-Trial Chamber I ("PTC I") issued two warrants of arrest against Omar Al Bashir.² These warrants of arrest remain to be executed.
3. On 6 March 2009 and 21 July 2010, the Registry, acting upon PTC I's request, issued the "Request to all States Parties to the Rome Statute for the arrest and surrender of Omar Hassan Ahmad Al Bashir"³ as well as the "Supplementary request to all States Parties to the Rome Statute for the arrest and surrender of Omar Hassan Ahmad Al Bashir" (the "2009 and 2010 Requests").⁴ These requests called for the cooperation of all States Parties in the arrest and surrender of Omar Al Bashir, pursuant to, *inter alia*, articles 89(1) and 91 of the Rome Statute (the "Statute").

¹ S/RES/1593 (2005).

² Pre-Trial Chamber I, "Warrant of Arrest for Omar Hassan Ahmad Al Bashir", 4 March 2009, ICC-02/05-01/09-1; "Second Warrant of Arrest for Omar Hassan Ahmad Al Bashir", ICC-02/05-01/09-95.

³ ICC-02/05-01/09-7.

⁴ ICC-02/05-01/09-96.

4. On 15 March 2012, the Presidency issued the "Decision on the constitution of Pre-Trial Chambers and on the assignment of the Democratic Republic of the Congo, Darfur, Sudan and Côte d'Ivoire situations", in which it reassigned, *inter alia*, the situation of Darfur, Sudan to this Chamber.⁵

5. On 26 February 2014, the Chamber was notified of the "Prosecution's Notification of Possible Travel in the Case of *The Prosecutor v Omar Al Bashir*" (the "Notification").⁶ In the Notification, the Prosecutor contended that, on the basis of media reports, there was a possibility that Omar Al Bashir would travel to the Democratic Republic of the Congo (the "DRC") to attend the "Common Market for Eastern and Southern Africa (COMESA) summit in Kinshasa" scheduled to take place on 26 and 27 February 2014.⁷ Accordingly, the Prosecutor requested that the Chamber take the necessary steps to: (a) ensure that the pending warrants of arrest against Omar Al Bashir are executed; (b) enquire about said visit from the authorities of the DRC; and (c) remind the DRC authorities of their "standing obligation to arrest persons for whom warrants of arrest have been issued by the ICC".⁸

6. On the same date, the Chamber issued the "Decision Regarding Omar Al Bashir's Visit to the Democratic Republic of the Congo", in which it, *inter alia*, requested the DRC to immediately arrest and surrender Omar Al Bashir to the Court and ordered the Registry to prepare a report concerning said visit to be submitted to the Chamber in due course (the "26 February 2014 Decision").⁹

⁵ Presidency, ICC-02/05-01/09-143.

⁶ ICC-02/05-01/09-185 and its annex A.

⁷ ICC-02/05-01/09-185, paras 1 and 8; ICC-02/05-01/09-185-AnxA.

⁸ ICC-02/05-01/09-185, para. 10.

⁹ Pre-Trial Chamber II, ICC-02/05-01/09-186, p. 5.

7. On 3 March 2014, the Chamber was notified of the "Registry's Report on the 'Decision Regarding Omar Al-Bashir's Visit to the Democratic Republic of the Congo'" (the "Registry's First Report").¹⁰ According to the Registry's First Report, Omar A-Bashir's visit had taken place and it was confirmed by the DRC authorities that he had left the country in the morning of 27 February 2014.¹¹

8. On the same date, the Chamber issued the "Decision Requesting Observations on Omar Al-Bashir's Visit to the Democratic Republic of the Congo",¹² in which it, *inter alia*, invited the competent authorities of the DRC to submit observations no later than Friday, 14 March 2014 on "(1) the failure to execute the requests for arrest and surrender of [Omar Al Bashir] to the Court and; (2) the alleged failure to consult with the Court in case of any problems identified which might have impeded the execution of the requests for his arrest and surrender during his visit to the country".¹³ The Chamber also ordered the Registry to submit a report to the Chamber "after having received the Government's observations [...]".¹⁴

9. On 18 March 2014, the Chamber received the "Transmission to Pre-Trial Chamber II of the observations submitted by the Democratic Republic of the Congo pursuant to the 'Decision requesting observations on Omar Al-Bashir's visit to the Democratic Republic of Congo' dated 3 March 2014",¹⁵ together with two public annexes appended thereto (the "Registry's Second Report").¹⁶

¹⁰ ICC-02/05-01/09-187 and its confidential annexes.

¹¹ ICC-02/05-01/09-187, p. 4.

¹² Pre-Trial Chamber II, ICC-02/05-01/09-189.

¹³ Pre-Trial Chamber II, ICC-02/05-01/09-189, p. 6.

¹⁴ Pre-Trial Chamber II, ICC-02/05-01/09-189, p. 6.

¹⁵ ICC-02/05-01/09-190.

¹⁶ ICC-02/05-01/09-190-AnxI; ICC-02/05-01/09-190-AnxII-ENG.

II. APPLICABLE LAW

10. The Chamber notes articles 21(1)(a) and (b), 27, 86, 87(7) 89, 97, 98(1) and 119(1) of the Statute, rule 195(1) of the Rules of Procedure and Evidence (the "Rules") and regulation 109(2), (3) and (4) of the Regulations of the Court (the "Regulations").

III. DETERMINATION BY THE CHAMBER

11. According to the Registry's Second Report, the DRC alleges that the non-enforcement of the Court's pending requests for the arrest and surrender of Omar Al Bashir was due to time and legal constraints.¹⁷

12. In relation to the time constraints, the DRC argues that the composition of the delegations invited to attend the COMESA summit "was communicated very late to the DRC State Protocol Service".¹⁸ According to the DRC, the fact that a foreign Head of State was on Congolese territory placed the DRC in a "complex, ambiguous and major situation" in light of the fact that the DRC is a State Party to the Statute and equally a member to the African Union.¹⁹ The DRC further alleges that Omar Al Bashir was invited "by a regional organisation and not by the [DRC]".²⁰ Moreover, the shortage of time between the arrival of Omar Al Bashir in the evening of 25 February 2014, the receipt of the Chamber's decision on 26 February 2014, and his early departure in the morning of the following day made it "materially impossible" to take a decision with such "legal, diplomatic and security implications".²¹ In the view of the DRC, if such move had taken

¹⁷ ICC-02/05-01/09-190-AnxII-tENG.

¹⁸ ICC-02/05-01/09-190-AnxII-tENG, p. 6.

¹⁹ ICC-02/05-01/09-190-AnxII-tENG, p. 6.

²⁰ ICC-02/05-01/09-190-AnxII-tENG, p. 6.

²¹ ICC-02/05-01/09-190-AnxII-tENG, p. 6.

place, it would have had "heavy consequences" on the State.²² Should there had been no time constraints, the DRC "would have contacted the Court and presented [these] difficulties upon receipt of the decision of [the Chamber]", the government adds.²³

13. The Chamber takes note of the above explanations and acknowledges the difficulties the DRC was facing. However, the Chamber finds the arguments put forward by the DRC unconvincing for different reasons laid down in the following paragraphs.

14. The Registry of the ICC, acting upon the instructions of PTC I, issued on 6 March 2009 and 21 July 2010 two cooperation requests for the arrest and surrender of Omar Al Bashir. Thus, the DRC cannot claim that the 26 February 2014 Decision requesting the DRC to immediately arrest and surrender Omar Al Bashir to the Court was novel or came as a surprise, and as such, created an "ambiguous and major situation" to the Congolese authorities. The DRC was put on notice about the Court's pending requests for more than four years and the fact that Omar Al Bashir left *only* one day after the notification of the 26 February 2014 Decision to the Congolese authorities cannot be an excuse. This is more so the case as the DRC was duty bound to execute the Court's pending 2009 and 2010 Requests before receiving the 26 February 2014 Decision and even without its issuance. The latter was no more than a reiteration and a reminder of the DRC's existing obligation to arrest Omar Al Bashir should he enter on the DRC territory.

²² ICC-02/05-01/09-190-AnxII-tENG, p. 6.

²³ ICC-02/05-01/09-190-AnxII-tENG, p. 6.

15. Moreover, the DRC's claim that the 26 February 2014 Decision placed the State "in a delicate and unmanageable situation"²⁴ proves that the Congolese authorities should have consulted or notified the Court in accordance with article 97 of the Statute and rule 195 of the Rules of the existence of a problem related to article 98(1) of the Statute which prevented it from discharging its obligations as a State Party to the Statute prior to or during the visit of Omar Al Bashir and before his departure. In particular, the DRC should have provided the Court, pursuant to rule 195(1) of the Rules, with any relevant information to assist the Chamber in deciding on the problem arising under article 98(1) of the Statute.²⁵ Yet, this was not done and instead of complying with its statutory obligations, the DRC chose to remain passive, alleging that the visit was short noticed and that the invitation came from "a regional organisation".

16. By so doing, the DRC disregarded the fact that the Court is the sole authority to decide whether or not the immunities generally attached to Omar Al Bashir as a sitting Head of State were applicable in this particular case. This conclusion finds support in article 119(1) of the Statute which provides that "[a]ny dispute concerning the judicial functions of the Court shall be settled by the decision of the Court".

17. Further, the Chamber cannot accept the argument that a regional organisation would carry out certain activities on the territory of a State without the latter's prior knowledge and consent. It is even harder to adhere to the DRC's allegation that the country's State Protocol Service was not informed in due course of the

²⁴ ICC-02/05-01/09-190-AnxII-ENG, p. 6.

²⁵ Pre-Trial Chamber I, "Corrigendum to the Decision Pursuant to Article 97(7) of the Rome Statute on the Failure by the Republic of Malawi to Comply with the Cooperation Requests Issued by the Court with Respect to the Arrest and Surrender of Omar Hassan Ahmad Al Bashir", 13 December 2011, ICC-02/05-01/09-139-Corr, para. 11.

visit of a sitting Head of State. In conclusion, in the absence of proper and logical justifications on the part of the DRC, the Chamber cannot accept their observations alleging time constraints.

18. Turning to the second part of the DRC's observations, namely the legal constraints which prevented the Congolese authorities from executing the Court's pending requests for arrest and surrender, the DRC acknowledges that it "was under an international obligation to arrest [Omar Al Bashir]".²⁶ Nonetheless, the DRC believes that such an international obligation was subject to the application of article 98(1) of the Statute, which calls for the Court to "first obtain the cooperation of that third State for the waiver of the immunity".²⁷

19. According to the DRC, Omar Al Bashir enjoys "certain immunities" as a result of his position as "Head of State".²⁸ Although article 27 of the Statute renders these immunities "ineffective", the DRC argues that they "remain valid", given that Omar Al Bashir is a "Head of a member State of the African Union", and that the latter decided in a recent decision passed on 12 October 2013 that "[...] no serving AU Head of State or Government [...] shall be required to appear before any international court or tribunal during their term of office".²⁹ In light of the decision of the African Union, the Court's request to arrest and surrender Omar Al Bashir "became inconsistent with their obligation to respect the immunities" attached to his position as a Head of State.³⁰

20. In addition, according to the DRC, in view of recent visits of Omar Al Bashir to a number of States Parties to the ICC Statute, such as Chad, Djibouti, Kenya

²⁶ ICC-02/05-01/09-190-AnxII-tENG, p. 6.

²⁷ ICC-02/05-01/09-190-AnxII-tENG, pp. 6-7.

²⁸ ICC-02/05-01/09-190-AnxII-tENG, p. 7.

²⁹ ICC-02/05-01/09-190-AnxII-tENG, p. 7.

³⁰ ICC-02/05-01/09-190-AnxII-tENG, p. 7.

and Nigeria, the Congolese authorities "wondered whether these countries were guided by the principle of immunity [as] he was a sitting Head of State".³¹

21. In this regard, the Chamber wishes to point out that the DRC's reliance on recent visits of Omar Al Bashir to some States Parties cannot relieve the State from its obligations to execute the 2009 and 2010 Requests. Whether or not the States Parties referred to by the DRC were "guided by the principle of immunity" is not the main issue. What is at stake is that the DRC, which is a State Party to the Statute, neither executed the 2009 and 2010 Requests issued by the Court, nor did it discharge its obligations to consult or notify the Court in due course as explained above.

22. Even assuming that these States were "guided by the principle of immunity" *re* the visits of Omar Al Bashir, the DRC could have still avoided a situation in which it had to "wonder about the decision it should take",³² as asserted. If the DRC, as stated earlier, had consulted or notified the Court of the problem faced under article 98(1) of the Statute instead of deciding itself on its applicability, a situation as such would have never arisen. It would have been made clear to the DRC that nowhere in any decision issued by the Court is there the slightest ambiguity about the Chambers' legal position regarding Omar Al Bashir's arrest and surrender to the Court, despite the arguments invoked relating to his immunity under international law. Had the Court found any legal impediment (procedural or substantive) to the execution of the pending requests for arrest and surrender of Omar Al Bashir, it would have explicitly ruled to that effect. But this was not the case and PTC I as well as this Chamber issued a number of decisions making findings on non-compliance of certain States Parties with their

³¹ ICC-02/05-01/09-190-AnxII-tENG, p. 8.

³² ICC-02/05-01/09-190-AnxII-tENG, p. 8.

obligations under the Statute, and referred the relevant States to the Assembly of States Parties, as well as to the SC.³³

23. Turning to the remaining yet related arguments put forward by the DRC concerning the issue of immunities and competing obligations, the Chamber recalls article 27 of the Statute which stipulates:

1. This Statute shall apply equally to all persons without any distinction based on official capacity. In particular, official capacity as a Head of State or Government, a member of a Government or parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility under this Statute, nor shall it, in and of itself, constitute a ground for reduction of sentence.
2. Immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person.

24. The Chamber further recalls article 98(1) of the Statute which reads:

1. The Court may not proceed with a request for surrender or assistance which would require the requested State to act inconsistently with its obligations under international law with respect to the State or diplomatic immunity of a person or property of a third State, unless the Court can first obtain the cooperation of that third State for the waiver of the immunity.

25. At the outset, the Chamber wishes to make clear that it is not disputed that under international law a sitting Head of State enjoys personal immunities from

³³ Pre-Trial Chamber I, "Decision informing the United Nations Security Council and the Assembly of the States Parties to the Rome Statute about Omar Al-Bashir's recent visit to the Republic of Chad", 27 August 2010, ICC-02/05-01/09-109; *id.*, "Decision informing the United Nations Security Council and the Assembly of the States Parties to the Rome Statute about Omar Al-Bashir's recent visit to Djibouti", 12 May 2011, ICC-02/05-01/09-129; *id.*, "Decision Pursuant to Article 87(7) of the Rome Statute on the Failure by the Republic of Malawi to Comply with the Cooperation Requests Issued by the Court with respect to the Arrest and Surrender of Omar Hassan Ahmad Al-Bashir", 12 December 2011, ICC-02/05-01/09-139; *id.*, "Decision pursuant to article 87(7) of the Rome Statute on the refusal of the Republic of Chad to comply with the cooperation requests issued by the Court with respect to the arrest and surrender of Omar Hassan Ahmad Al-Bashir", 13 December 2011, ICC-02/05-01/09-140-(ENG); Pre-Trial Chamber II, "Decision on the Non-compliance of the Republic of Chad with the Cooperation Requests Issued by the Court Regarding the Arrest and Surrender of Omar Hassan Ahmad Al-Bashir", 26 March 2013, ICC-02/05-01/09-151.

criminal jurisdiction and inviolability before national courts of foreign States even when suspected of having committed one or more of the crimes that fall within the jurisdiction of the Court. Such personal immunities are ensured under international law for the purpose of the effective performance of the functions of sitting Heads of States. This view has also been supported by the International Court of Justice (the "ICJ").³⁴ An exception to the personal immunities of Heads of States is explicitly provided in article 27(2) of the Statute for prosecution before an international criminal jurisdiction. According to this provision, the existence of personal immunities under international law which generally attach to the official capacity of the person "shall not bar the Court from exercising its jurisdiction over such a person".

26. Still, the question *sub judice* is how far reaching this provision is meant to be, and whether such an exception for lifting personal immunities applies to Heads of all States, including non-States Parties to the Statute (third States), or whether it is only confined to those States which have adhered to the Statute. Given that the Statute is a multilateral treaty governed by the rules set out in the Vienna Convention on the Law of Treaties,³⁵ the Statute cannot impose obligations on third States without their consent.³⁶ Thus, the exception to the exercise of the

³⁴ ICJ, "*Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*", Judgment, 14 February 2002, paras 53-59.

³⁵ Appeals Chamber, "*Judgment on Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal*", 13 July 2006, ICC-01/04-168, para. 33 (noting that the "interpretation of treaties, and the Rome Statute is no exception, is governed by the Vienna Convention on the Law of Treaties").

³⁶ UNTS, Vol. 1155, art. 34 [hereinafter "VCLT"]. For the exceptions to the rule, see arts 35 and 38 of the VCLT. See also Pre-Trial Chamber I, "*Decision on the request of the Defence of Abdullah Al-Semussi to make a finding of non-cooperation by the Islamic Republic of Mauritania and refer the matter to the Security Council*", 28 August 2013, ICC-01/11-01/11-420, para. 12; Pre-Trial Chamber II, "*Decision Regarding Omar Al-Bashir's Potential Travel to the Federal Republic of Ethiopia and the Kingdom of Saudi Arabia*", 10 October 2013, ICC-02/05-01/09-164, para. 7; Pre-

Court's jurisdiction provided in article 27(2) of the Statute should, in principle, be confined to those States Parties who have accepted it.

27. It follows that when the exercise of jurisdiction by the Court entails the prosecution of a Head of State of a non-State Party, the question of personal immunities might validly arise. The solution provided for in the Statute to resolve such a conflict is found in article 98(1) of the Statute. This provision directs the Court to secure the cooperation of the third State for the waiver or lifting the immunity of its Head of State. This course of action envisaged by article 98(1) of the Statute aims at preventing the requested State from acting inconsistently with its international obligations towards the non-State Party with respect to the immunities attached to the latter's Head of State.

28. In the case *sub judice* the DRC claims that by issuing the 26 February 2014 Decision the Court placed the DRC in a situation where it was called upon to act inconsistently with its international obligations arising from the decision of the African Union "to respect the immunities that come with [Omar Al Bashir's] position of Head of State".²⁷

29. This position stands to be corrected. The Chamber does not consider that such inconsistency arises in the present case. This is so because by issuing Resolution 1593(2005) the SC *decided* that the "Government of Sudan [...] shall cooperate fully with and provide any necessary assistance to the Court and the Prosecutor pursuant to this resolution".²⁸ Since immunities attached to Omar Al

Trial Chamber II, "Decision Regarding Omar Al-Bashir's Potential Travel to the United States of America", 18 September 2013, ICC-02/05-01/09-162, para. 10.

²⁷ ICC-02/05-01/09-190-AnxII-tENG, p. 7.

²⁸ SC Res 1593(2005), para. 2.

Bashir are a procedural bar³⁹ from prosecution before the Court, the cooperation envisaged in said resolution was meant to eliminate any impediment to the proceedings before the Court, including the lifting of immunities. Any other interpretation would render the SC decision requiring that Sudan "cooperate fully" and "provide any necessary assistance to the Court" senseless. Accordingly, the "cooperation of that third State [Sudan] for the waiver of the immunity", as required under the last sentence of article 98(1) of the Statute, was already ensured by the language used in paragraph 2 of SC Resolution 1593(2005). By virtue of said paragraph, the SC implicitly waived the immunities granted to Omar Al Bashir under international law and attached to his position as a Head of State. Consequently, there also exists no impediment at the horizontal level between the DRC and Sudan as regards the execution of the 2009 and 2010 Requests.

30. As stated in paragraph 19 above, the DRC maintains to be bound by the obligation that "no serving AU Head of State or Government [...] shall be required to appear before any international court or tribunal during their term of office".⁴⁰ However, it follows from the above that the conflicting obligations which the DRC claims exist are not merely between the African Union and the Court. Rather, the conflict actually lies between the decision of the African Union to retain the immunity of Omar Al Bashir and the SC Resolution 1593(2005) which removed such immunity for the purpose of the proceedings before the Court. In this case, the conflict is resolved by virtue of articles 25 and 103 of the UN Charter. According to article 25 of the UN Charter "[t]he Members of the United Nations agree to accept and carry out the decisions of the Security

³⁹ ICJ, *Jurisdictional Immunities of the State (Germany v. Italy; Greece Intervening)*, Judgment, 3 February 2012, para. 58.

⁴⁰ ICC-02/05-01/09-190-AnxII-tENG, p. 7.

Council in accordance with the [...] Charter". In its advisory opinion on *Namibia* the ICJ stated, "when the Security Council adopts a decision under article 25 in accordance with the Charter, it is for member States to comply with that decision [...]. To hold otherwise would be to deprive this principal organ of its essential functions and powers under the Charter".⁴¹

31. Further, according to article 103 of the UN Charter "[i]n the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the [...] Charter shall prevail".⁴² Considering that the SC, acting under Chapter VII, has implicitly lifted the immunities of Omar Al Bashir by virtue of Resolution 1593(2005), the DRC cannot invoke any other decision, including that of the African Union, providing for any obligation to the contrary.

32. In view of the foregoing, the Chamber considers that the DRC not only disregarded the 2009 and 2010 Requests related to its obligation to cooperate in the arrest and surrender of Omar Al Bashir, pursuant to articles 86 and 89 of the Statute, but also SC Resolution 1593(2005).⁴³ This course of action calls upon the SC and the Assembly of States Parties to take the necessary measures they deem appropriate.

33. In this context, the Chamber wishes to reiterate that, unlike domestic courts, the ICC has no direct enforcement mechanism in the sense that it lacks a police

⁴¹ ICJ, "Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)", Advisory Opinion, 21 June 1971, para. 116.

⁴² See also ICJ, "Case Concerning Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United Kingdom)", Provisional Measures, Order of 14 April 1992, para. 37.

⁴³ S/RES/1593 (2005). As stated above, the DRC is a member of the United Nations, and accordingly, by virtue of article 25 of the UN Charter, it is bound "to accept and carry out the decisions of the Security Council in accordance with the [...] Charter".

force. As such, the ICC relies mainly on the States' cooperation, without which it cannot fulfil its mandate. When the SC, acting under Chapter VII of the UN Charter, refers a situation to the Court as constituting a threat to international peace and security, it must be expected that the Council would respond by way of taking such measures which are considered appropriate, if there is an apparent failure on the part of States Parties to the Statute or Sudan to cooperate in fulfilling the Court's mandate as entrusted to them by the Council. Otherwise, if there is no follow up action on the part of the SC, any referral by the Council to the ICC under Chapter VII of the UN Charter would never achieve its ultimate goal, namely, to put an end to impunity. Accordingly, any such referral would become futile.

34. Having stated the above, the Chamber recalls article 87(7) of the Statute according to which, "[w]here a State Party fails to comply with a request to cooperate by the Court contrary to the provisions of this Statute [...] the Court may make a finding to that effect and refer the matter to the Assembly of States Parties or, where the Security Council referred the matter to the Court, to the Security Council". Since the DRC has failed to cooperate with the Court with regard to the arrest and surrender of Omar Al Bashir, thus preventing the institution from exercising its functions and powers under the Statute, the Court cannot but refer the matter to the Assembly of States Parties and the SC.

FOR THESE REASONS, THE CHAMBER HEREBY

a) **finds** that the Democratic Republic of the Congo: (1) has failed to cooperate with the Court by deliberately refusing to arrest and surrender Omar Al Bashir, ~~thus preventing the Court from exercising its functions and powers under the~~ Statute; and (2) has failed to comply with its obligations to consult with the Chamber in accordance with article 97 of the Statute and rule 195(1) of the Rules on the problem(s) which have impeded the execution of the requests for arrest and surrender of Omar Al Bashir during his visit, namely to bring to the attention of the Court relevant information which would have assisted it in deciding on the problem raised under article 98(1) of the Statute;

b) **refers**, in accordance with regulation 109(4) of the Regulations, the present decision to the President of the Court for transmission to the Security Council, through the Secretary General of the United Nations; and

c) **refers**, in accordance with regulation 109(4) of the Regulations, the present decision to the President of the Court for transmission to the Assembly of States Parties.

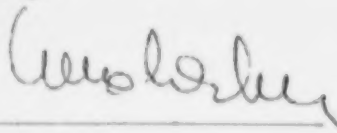
Done in both English and French, the English version being authoritative.



Judge Ekaterina Trendafilova
Presiding Judge



Judge Hans-Peter Kaul



Judge Cuno Tarfusser

Dated this Wednesday, 9 April 2014

At The Hague, The Netherlands

No. ICC-02/05-01/09

9 April 2014